In the Supreme Court of the United States

October Term, 1950 - - - - Number 330

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, GEORGE KOECHEL and CHARLES BREHM, Individually and in Their Representative Capacity,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, Individually and as Members of the Wisconsin Employment Relations Board; CARL LUDWIG, H. HERMAN RAUCH and MARTIN KLOTSCHE, Individually and as Members of a Board of Arbitration, and THE MILWAUKEE ELECTRIC RAILWAY & TRANSPORT COMPANY, a Wisconsin Corporation,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Wisconsin.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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OPINION BELOW.

The opinion of the Wisconsin Supreme Court (R. 235-237) is reported at 257 Wis. 53. The opinion of the circuit court (R. 101-106) is not reported.

JURISDICTION.

The judgment of the Wisconsin Supreme Court was entered May 2, 1950. (R 234) A motion for rehearing was denied on June 30, 1950. (R. 239) The jurisdiction of this Court is invoked under Section 1257(3) of Title 28, U. S. C.

QUESTIONS PRESENTED.

1. Whether a State may by statute prohibit strikes which threaten to interrupt an essential public utility service.

2. Whether a State, having prohibited strikes in such cases, can require that labor disputes be settled by arbitration when they have reached an impasse.

STATE STATUTES INVOLVED.

The State statutes involved are printed in Appendix A to the petition.

STATEMENT.

In addition to the facts stated in the petition, we would like to add that the respondent Company is a local urban transportation company furnishing transportation only to Milwaukee and its immediately surrounding suburbs. (R. 131)

After the case below was presented by briefs and oral argument to the Wisconsin Supreme Court, the Union and the Company entered into a labor contract on April 7, 1950, effective as of April 1, 1950, said contract not to expire until September 20, 1951. (Appendix A)

ARGUMENT.

I.

The Principle Issues Presented by the Petition Are Now Moot.

In petitioners' brief under the title "*Question Presented,*" the principal question set forth is as follows:

> "Whether a State may by statute require employees of a 'public utility' employer to submit disputes regarding contract terms to arbitration and to be bound by the results of such arbitration for a period of one year, the same statute making it a criminal offense for such employees to strike."

We submit that this question has become moot, and therefore is no longer open to adjudication. The nature of this suit was an action to review and set aside an order of the arbitration board. Section 111.59 of the Wisconsin Statutes provides that the order of the arbitration board shall "continue effective for one year from that date (the date filed with the Clerk of Circuit Court), but such order may be changed by the mutual consent or agreement of the parties." The order of the arbitration board was issued on April 9, 1949, and was filed with the Clerk of the Circuit Court for Milwaukee County on April 11, 1949. (R. 222) By virtue of Section 111.59 the order became ineffective on April 11, 1950, unless changed by agreement of the parties. The parties entered into a contract on April 7, 1950, to run for 18 months (Appendix A), which by operation of law rendered the arbitration order ineffectual. Thus there is no longer any occasion to challenge the power of the state to require public utility employers and employees to submit to arbitration. No justiciable contro-

versy now exists in which petitioners can challenge the state's power. This Court has no jurisdiction to pass on a federal question that is moot. *Kimball vs. Kimball*, 174 U. S. 158; *Little vs. Bowers*, 134 U. S. 547.

The same is true of the companion case, No. 329, October Term, 1950, in which a Petition for Writ of Certiorari was filed at the same time with the case at bar. Both cases arose out of the same dispute and involve the same statute and the same question of law. In both cases the Union has challenged the validity of Section 111.50-111.65 of the Wisconsin Statutes. Before the Wisconsin Supreme Court, the Union in *each* case urged that the state had no power to prohibit strikes and to require the submission of disputes to arbitration. However, in its two Petitions before this court, the Union for reasons of brevity or otherwise, has sought to separate these issues. In its brief in the instant case, it attacks only the power to require arbitration, and in the companion case it attacks the power to prohibit strikes. These two issues cannot be considered separately. The requirement to submit to arbitration is inherently and necessarily correlated to the prohibition of the right to strike. It is in effect a substitute for the right to strike.

The issue in the companion case is likewise moot. The arbitration order is no longer in effect. The parties voluntarily entered into a contract on April 7, 1950, which will not expire until September 30, 1951. (Appendix A) The parties are no longer proceeding under the Wisconsin law in question. They are now carrying on under a labor contract conclusively presumed to be acceptable to both. Petitioner is no longer in a position to attack the injunction.

II.

The Wisconsin Statutes Are Not in Conflict With the Taft-Hartley Act.

As we have concluded that the two principal issues involved in these two cases, viz., the power of the state to prohibit strikes in the public utility industry and the power to require that labor disputes in public utilities be submitted to arbitration, are necessarily interrelated and cannot be considered separately, we shall direct our argument to both issues.

Petitioner has urged that the Wisconsin law is in direct and irreconcilable conflict with the Labor Management Relations Act, 61 Stats. 136, USCA §§141-197, more commonly referred to as the Taft-Hartley Act. Petitioner more particularly asserts that the prohibition of the right to strike by public utility employees and the substitution therefor of the compulsory arbitration procedure is a direct infringement of the employees' right "to engage in other concerted activities for the purpose of collective bargaining," as set forth in Section 7 of the Federal Act.

To answer this contention it should be noted at the outset that the right to strike is not an absolute and unqualified right. *International Union vs. Wisconsin E. R. Board*, 336 U. S. 245; *Allen-Bradley Local vs. Wisconsin E. R. Board*, 315 U. S. 740.

Section 7 of the Taft-Hartley Act recognizes the right of employees to engage in "concerted activities." Did Congress by the use of this general term intend to take away from a state its power to protect its inhabitants in respect to the maintenance of essential public utility services? We contend that Congress had no such intention. This Court has said that "the intention of Congress to exclude the States from exercising their police power must

be clearly manifested," and that the Court "will not lightly infer that Congress by the mere passage of a Federal Act has impaired the traditional sovereignty of the several states in that regard." *Allen-Bradley Local vs. Wisconsin E. R. Board*, supra; *International Union vs. Wisconsin E. R. Board*, supra.

A — The Wisconsin legislature sought to protect the public from the dire consequences that result from the interruption of an essential public utility service.

In the enactment of the Wisconsin act, it is apparent that the legislature took into consideration the dire consequences that may result from the interruption of essential public utility services. Consider, for example, the electric utility industry. It does not require a high degree of imagination to realize the consequences that may be incident to the interruption of electric service. Many thousands of homes would be unheated; it would be impossible to properly cook and prepare foods for human consumption; there would be no adequate water supply for human consumption or for purposes of sanitation; practically all of the large industrial factories would be required to close their doors because of lack of power to operate the same and as a result many of thousands of employees would be thrown out of work; there would be great hazard from fire; and with unlighted streets and lack of electrical energy for operation of police signals crime might create a major problem.

B — Public utilities are virtually agencies of the State.

In approaching this question we must bear in mind the unique nature of the public utility industry. In Wisconsin the operations of public utilities have been subject to state control and regulation for many years. The state not only determines what rates or fares the utility may charge, but it also determines and regulates the right to engage in or to discontinue operations, the quality and quantity of service to be rendered, the issuance of securities, the construction and expansion of facilities, and the manner and method of accounting. See opinion below, 257 Wis. 43, at 47.

Public utilities are virtually agencies of the State of Wisconsin and are delegated to carry out some of the sovereign powers of the state. For example, public utilities have been delegated the power of eminent domain. Section 32.02, Wisconsin Statutes. It has often been stated that eminent domain is an attribute of sovereignty. *Mississippi and R. R. B. Co. vs. Patterson*, 98 U. S. 403. Only because the state and its political subdivisions have not seen fit to engage directly in the public utility business, do we find private enterprise engaged in the business, and subject to broad and extensive governmental regulation.

Public utilities serve exactly the same functions regardless whether they are in private or public ownership. Therefore from a constitutional standpoint the decision in this case should be made on the basis of the same legal principles as would apply if all the public utilities of Wisconsin were owned and operated by the state.

This Court has consistently held that various constitutional guarantees do not impose restrictions upon the power of the individual states in the regulation of public utilities to the same extent as they may impose restrictions upon

the states in the regulation of ordinary business enterprises. An entirely different application has been given to constitutional provisions in respect to the power that a state may exercise over a public utility, its property and its employes, as compared to the power which a state may exercise over ordinary business ventures. Yet we find that the constitutional provisions do not contain any express language differentiating between the public utility business and ordinary business activities. If the courts may properly interpret general language in the Constitution as having a different application in respect to public utilities than in respect to ordinary business, why may not the Taft-Hartley Act have a similar interpretation?

If the Wisconsin legislature had enacted a statute directly fixing the wages of public utility employees, it could not well be doubted that such an act would be an appropriate exercise of legislative power. If the legislature in the exercise of its legislative function were to enact a statute prescribing a definite amount of wages and pensions to be paid by a public utility to all of its employees, and if it also definitely prescribed all conditions of employment, could it be reasonably maintained that such a statute would be invalid on the ground that it conflicted with the Taft-Hartley Act in that the employees had no opportunity to bargain in respect to wages, pensions and working conditions? If this is the correct interpretation of the Taft-Hartley Act it necessarily follows that even in respect to publicly owned public utilities, Congress could, from a constitutional standpoint, render a state legislature powerless to enact a law establishing wages, pensions or employment conditions for public utility employees.

C — *The Constitution was intended to create "an indestructible Union, composed of indestructible States."*

1. *It is improper to interpret the commerce clause as giving to Congress the power to destroy state government.*

The members of plaintiff Union and the individual plaintiffs are not engaged in interstate commerce. They are engaged solely in intrastate commerce. They contend, however, that their activities affect interstate commerce and therefore the State is without power to prescribe their wages and working conditions because to do so would conflict with the Taft-Hartley Act. If this be true it would seem that this Court has erred when it has declared that our Constitution looks to "an indestructible Union, composed of indestructible States." That every reasonably permissible presumption should be made against the deprivation of a government of its sovereign power is clearly indicated by the language of the Supreme Court in *Texas vs. White*, 7 Wall. 700, 725, as follows:

> "Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

If a state is to be powerless to exercise its police power as a means of protecting its right to insure the continuity of essential public utility services, it would seem that the rights of states are fictitious.

When the people gave to Congress the power to regulate interstate commerce did they thereby intend in effect to give Congress the power to destroy a state government by making it impossible for a state to regulate employees of an intrastate public utility engaged in furnishing the vital necessities of life in such state? If so, the statement that our Constitution created "an indestructible Union, composed of indestructible States" is mere rhetoric.

In holding that in the absence of express language a statute should not ordinarily be interpreted as a limitation upon a sovereign authority, the Court in *United States vs. United Mine Workers of America*, 330 U. S. 258, 272, said:

> "There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect. * * * Congress was not ignorant of the rule which those cases reiterated; and, with knowledge of that rule, Congress would not, in writing the Norris-LaGuardia Act, omit to use 'clear and specific (language) to that effect' if it actually intended to reach the Government in all cases."

D — A public utility employer has no bargaining power to meet the threat of a strike.

Petitioner contends that the prohibition of the right to strike does violence to the entire concept of collective bargaining. Petitioner fails to appreciate that in the public utility industry, if the employees were allowed to strike, the employer has no bargaining power. If a strike were to interrupt the service of an electric utility, the employer

would doubtless have to accede to the union demands in less than 24 hours. The interruption of the service would so vitally affect every inhabitant of the community, and the ensuing public pressure would be so great, that the employer would have no choice but to capitulate immediately.

"When we consider the very unique characteristics of the public utility industry, and further consider the disastrous effects of any interruption of a service rendered by a public utility, can it be argued that Congress, by recognizing in general terms the right of employees to engage in concerted activities, intended to foreclose to the states the power to assure the constant flow of the vital public utility services to its inhabitants.

E — Congress has prohibited Federal employees from striking.

Congress through the enactment of Section 305 of the Taft-Hartley Act made it unlawful for Federal employees to go on strike. 61 Stat. 160, 29 U. S. C. A. §188. Section 305 provides in part as follows:

> "It shall be unlawful for any individual employed by the United States or any agency thereof including wholly owned Government corporations to participate in any strikes."

Congress undoubtedly felt that in order to prevent any interruption of the vital service rendered by the Federal Government and its agencies, it was necessary to prohibit strikes by Federal employees. Can it therefore be reasonably argued that by recognizing in Section 7 the right of employees to engage in "concerted activities," Congress intended to deprive the states from enacting similar

measures to assure the continuity of vital services within their boundaries? When we consider that the states already possessed such power under the Tenth Amendment, it is apparent that it was not necessary that Congress grant such power to the states. To interpret the Act otherwise would be to say that Congress intended to discriminate against the states in favor of the Federal government.

F — Congress has provided for injunctions against strikes which would imperil the national health and safety.

1. *It was left to the states to take similar measures to cope with emergencies affecting the health and safety of their citizens.*

The "public utility anti-strike" law of New Jersey was held not to be in conflict with the Taft-Hartley Act in *In re New Jersey Bell Telephone Co.*, 26 LRRM 2585 (N. J. Sup. Ct., October 2, 1950). In this case it was the union who was seeking to uphold the statute and the company was attacking it. The court pointed out that Sections 206-210 of the Taft-Hartley Act provide for the enjoining of strikes which would imperil the national health or safety. 61 Stat. 154, 29 U. S. C. A. §§176-180. Were the states foreclosed from enacting similar measures to cope with local emergencies? In upholding the state statute, the court said:

> "* * * Our examination of the Federal Act discloses no provision therein which prohibits a state, in the exercise of its police power, from protecting itself against strikes or lockouts in public utilities which would imperil the health and safety of its citizens. It is noted that the Labor-Management Relations Act, 1947, in Sections 206-210, authorizes the Federal Government to proceed, pursuant thereto, to

enjoin threatened strikes or lockouts which, if permitted to occur, might imperil the national health or safety. We find no authority in the Federal Act for the Federal Government to so act to prevent similar emergencies which may be state-wide only and which may be of insufficient magnitude to imperil the national health and safety. Since we find no provision in the Federal Act prohibiting a state from enjoining threatened strikes or lockouts in public utilities which, if permitted to occur, might imperil the health, welfare and safety of its people in an emergency of state-wide proportions only, since the Federal Act does not authorize the Federal Government to act in such cases, and since the 'intention of Congress to exclude the states from exerting their police power must be clearly manifested,' Allen Bradley Local vs. Wisconsin Employment Relations Board, 315 U. S. 740, * * * we conclude that the right of the states to prohibit strikes or lockouts in this sphere has not been pre-empted by Congress, and that the O'Brien case, supra, is inapplicable to the present situation."

As above pointed out Congress sought only to legislate with respect to emergencies imperiling the national health and safety. Certainly it was not the intent of Congress by so legislating to foreclose the states from taking measures to prevent emergencies confined within its own borders. Obviously Congress recognized that this was a field for state legislation.

G — Congress recognized that parties to labor disputes have no right to engage in practices which jeopardize the public health, safety, or interest.

To properly construe Section 7 of the Federal Act, we must first look to the Congressional intent. In Section 1 entitled, "*Congressional declaration of purpose and policy,*" we find in clear and unmistakable language the primary purpose which Congress sought to achieve, viz., "the free flow of commerce." Congress further declared that industrial strife which interferes with the normal flow of commerce can be avoided or substantially minimized if employers, employees, and labor unions "above all recognize under law that neither party has any right in its relations with any other *to engage in acts or practices which jeopardize the public health, safety, or interest.*" (Emphasis supplied) Another expressed purpose of the Act was "to protect the rights of the public in connection with labor disputes affecting commerce."

The Wisconsin law is in full accord with the expressly declared purpose and policy of the Taft-Hartley Act. The Wisconsin legislature had solely in mind "the public health, safety, or interest." The purpose of the Act was not to take away rights of the employees and employers of the public utility industry, but to protect the public. To accomplish this goal, the rights of the employers and employees necessarily had to be restricted.

H — Congress has not legislated beyond right of employees to be free from employer coercion.

In commenting upon the fundamental purpose of the Wagner Act, Justice Frankfurter, in a dissenting opinon in *Hill vs. Florida*, 325 U. S. 538; declared:

"* * * The whole plan or scheme of the Wagner Act was to enable employees to bargain on a fair basis, freed from 'restraint or coercion by their employer' through the protection given by the Federal government.

* * * * * *

"*All activities or aspects of labor organizations outside of their right to be free from employer coercion were left wholly unregulated by that Act.* (Emphasis supplied)

* * * * * *

"There is not a breath in the Act referring to any aspect of union activity unrelated to employer interference therewith. By refusing to legislate beyond that, Congress did not forbid the States from so legislating. * * *" (pp. 558, 559)

Justice Frankfurter's above statement is equally applicable to the Taft-Hartley Act. The Wisconsin law in no respect infringes upon the right of employees to be free from employer coercion.

We are unable to find any clear manifestation in the Taft-Hartley Act that the states were being excluded from exercising their police power to protect the public health and safety. On the contrary, as pointed out above, Congress expressly declared that neither employers or employees have any right "to engage in acts or practices which jeopardize the public health, safety, or interest." Section 1(b).

I — General terms should be interpreted so as not to lead to absurd results.

To construe Section 7 of the Federal Act as foreclosing the State of Wisconsin from enacting this law to prevent the interruption of vital public utility services is to lead to an absurd result. One of the first and foremost canons for the interpretation or construction of words in a constitution or statute requires that the intention of the lawmakers must control and when general language is used and a literal interpretation thereof would result in absurd consequences, such general language is not to be given a literal interpretation. In *Jacobson vs. Massachusetts,* 197 U. S. 643, 655, this Court set forth this familiar rule as follows:

> "'All laws,' this court has said, 'should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter'."

In *Church of the Holy Trinity vs. United States,* 143 U. S. 226, 228, this Court said:

> "It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."

In *United States vs. American Trucking Association,* 310 U. S. 534, this Court declared as follows:

"Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."

It is inconceivable that Congress intended that a state should be powerless to adequately protect its citizens from the dire consequences that inevitably follow from a public utility strike.

General terms in a constitution are likewise subject to limitation. For example, the right of freedom of speech is qualified, *Carpenters Union vs. Ritter's Cafe*, 315 U. S. 722; and this Court has declared that "without such limitation, it might be the scourge of the republic." *Gitlow vs. New York*, 268 U. S. 652. The constitutional right of freedom of contract is not an absolute right. *Munn vs. Illinois*, 94 U. S. 113.

If general words in constitutional guaranties are subject to limitations and qualifications, certainly general words appearing in the Taft-Hartley Act are equally subject to limitations as a means of carrying out the intent and purpose that prompted the passage of the law.

J — Congress has made it clear that the right to strike is limited.

An examination of the legislative history of Section 13 of the Taft-Hartley Act clearly shows that the right to strike as set forth in Section 7 is a qualified right.

The Taft-Hartley Act amended Section 13 of the Wagner Act by adding the italicized words, so it now reads:

"Nothing in *this subchapter, except as specifically provided for herein,* shall be construed so as either to interfere with or impede or diminish in any way the right to strike, *or to affect the limitation or qualification on that right.*" (Emphasis supplied)

The Report of the Committee of Conference includes the following statement with respect to the amendment of Section 13:

"The Senate amendment also added one other important provision to this section, providing that *nothing in the act was to affect the limitations or qualifications on the right to strike, thus recognizing that the right to strike is not an unlimited and unqualified right.* The conference agreement adopts the provisions of the Senate amendment. * * *" (Emphasis supplied) House Report No. 510, June 3, 1947 (U. S. Code Congressional Service, 80th Congress, First Session, 1947, pages 1165-1166).

We are not to be left to conjecture as to the interpretation to be given to Section 13. The Court in the *Briggs & Stratton* case, 336 U. S. 245, held that the Wisconsin board could order the union to cease and desist from instigating intermittent and unannounced work stoppages. In the course of the opinion, Justice Jackson, speaking for the majority of the Court, said:

"* * * Unless we read into §13 words which Congress omitted and a sense which Congress showed no intention of including, *all that this provision does is to declare a rule of interpretation for the Act itself which would prevent any use of what originally was a novel piece of legislation to qualify or impede whatever right to strike exists under other*

laws. It did not purport to modify the body of law as to the legality of strikes as it then existed. This Court less than a decade earlier had stated that law to be that the state constitutionally could prohibit strikes and make a violation criminal. It had unanimously adopted the language of Mr. Justice Brandeis that 'Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike,' Dorchy vs. Kansas, 272 U. S. 306, 311, 71 L. Ed. 248, 269, 47 S. Ct. 86." (Emphasis supplied)

* * * * *

"* * * That Congress has concurred in the view that neither §7 nor §13 confers absolute right to engage in every kind of strike or other concerted activity does not rest upon mere inference; indeed the record indicates that, had the Courts not made these interpretations, the Congress would have gone as far or farther in the direction of limiting the right to engage in concerted activities including the right to strike. * * *" (See full text of Committee Report at Note 15, 336 U. S. 245, 260)

On page 6540 of Volume 93 of the Congressional Record (Legislative History, p. 883) statements made by Congressman Hartley, a co-author of the bill, in response to an inquiry by Wisconsin's Congressman Kersten, are set forth as follows:

"Mr. Kersten of Wisconsin: * * *

'I would like to ask the gentleman about that portion which pertains to the validity of state laws. We are very anxious that disputes be settled at the state level so far as it is possible. Can the gentleman give us assurance on that proposition, so that

it is a matter of record, that that is the sense of the language and of the report?'

"Mr. Hartley:

'That is the sense of the language of the bill and of the report. That is my interpretation of the bill, that this will not interfere with the State of Wisconsin in the administration of its own laws. In other words, this will not interfere with the validity of the laws within that State.' "

The statements of Mr. Hartley clearly indicate that Congress was aware of the importance of permitting states to continue to exercise their traditional police powers concerning such labor practices as the states may regard as inimical to the public welfare.

When we start with the premise that the right to strike is not absolute but is a qualified right, and further consider the express declared purpose and policy of the Federal Act, and also the fundamental canon of construction that general terms must be so construed so as not to lead to absurd results, it seems quite clear that the Wisconsin law does not conflict with the Federal Act, but goes beyond the scope of the latter and covers a field intended by Congress to be left to the states.

K — The O'Brien case is not applicable to the present issues.

Petitioner contends that *International Union vs. O'Brien*, 94 L. ed. 659 (October Term, 1949), is completely determinative of the issue. The Michigan statute involved in that case was a general labor relations law and applied to *all* employees and employers generally. The Wisconsin

law is narrowly confined to a single industry, and only applied under certain circumstances. The Michigan act required a majority vote of all of the members of the bargaining unit before a strike could be called, whereas the Taft-Hartley Act has no such requirement. Thus, under the Michigan law, no group of employees in *any* industry or business within the state, regardless of whether it affected interstate commerce or not, could strike unless such majority vote was first obtained.

The Wisconsin statute, on the other hand, is narrowly confined to a single industry, and only applies under certain circumstances. The act only prohibits those strikes which would "cause an interruption of an essential service." Thus the act does not flatly prohibit *all* strikes in public utilities. If the service could continue to be furnished, notwithstanding a strike among some of the employees, such a strike would not be within the prohibition of the act.

It is of the utmost importance to bear in mind the distinction between a broad, all-inclusive statute and a narrow statute which is confined to a concrete situation. See *Milk Wagon Drivers U. vs. Meadowmoor Dairies,* 312 U. S. 287 at 297. When we consider that the requirement of this Michigan act, with respect to a majority vote being a condition precedent to a strike, applied to *all* employers and employees, and further consider that the Taft-Hartley Act has no such requirement, it is not difficult to see why this Court in the *O'Brien* case held such a sweeping piece of legislation to be indirect and irreconcilable conflict with the Federal law. The *O'Brien* case was held not to be applicable in *In re New Jersey Bell Tel. Co.,* 26 LRRM 2585.

This Court in the *O'Brien* case said that *International Union vs. Wisconsin E. R. Board* was not controlling because that case "was not concerned with a traditional, peaceful strike." It is submitted that a strike in a public utility industry is similarly not "a traditional, peaceful strike." True, there may be no violence whatsoever on the part of the striking workers, but the inevitable results of a public utility strike are of such a grave consequence, in fact they give rise to a state of emergency, that it cannot be said such strikes are of the traditional, peaceful nature.

L — Certification by the National Board does not deprive a state of its police power.

Petitioner seems to place great weight on the fact that the union had been certified by the National Board. We submit that this factor is wholly immaterial to the issues here presented. This Court in *Algoma P. & V. vs. Wisconsin E. R. Board*, 336 U. S. 301, said:

> "The character of activities left to State regulation is not changed by the fact of certification."

M — The compulsory arbitration procedure of the Wisconsin law comes into play only when collective bargaining has failed.

(1) Petitioner asserts at page 13 of its brief that the compulsory arbitration feature of the Wisconsin law destroys good faith collective bargaining. On the contrary, we submit that it creates a real incentive for good faith bargaining because unless both parties can come to an

agreement by voluntary negotiation, the matter will be taken out of their hands entirely and be determined by the state through a statutory tribunal.

Because Wisconsin has determined that strikes in public utilities are against the public policy of the state, it had to select a substitute for this coercive method of collective bargaining. Certainly the selection of compulsory arbitration, to come into play only when collective bargaining has reached an impasse, was a reasonable one. It is the only feasible way to break an impasse, and at the same time assure the constant rendition of the vital public utility services. If the state through its police powers can prohibit strikes which threaten to interrupt essential public utility services, it only logically follows that it may provide for compulsory arbitration as an alternative.

(2) The statements of Senator Taft which petitioner has quoted in its brief are not persuasive to petitioner's position. They only go to show that Congress did not want to provide for compulsory arbitration on a nation-wide scale. By not adopting compulsory arbitration for *all* industries, does it necessarily follow that Congress intended that a state was foreclosed from providing for it in a single industry—one in which it was against the public policy of the state to permit strikes? Clearly Congress had no such intention. We are not dealing here with a competitive industry operated as a free enterprise, but with a public utility industry which has for years been closely regulated by the state.

(3) Petitioner states at page 18 of its brief that under the Wisconsin act the state board, before invoking the arbitration procedure, must first make a determination that the parties have bargained in good faith. Petitioner then

argues that this conflicts with the superior jurisdiction of the National Board to make such determination. On the contrary, under the Wisconsin law the board only has to make a finding that the collective bargaining process has reached an impasse and stalemate, and that such dispute will cause an interruption of an essential service. Section 111.54 provides in part:

> "* * * Upon the filing of such petition, the board shall consider the same, and if in its opinion, the collective bargaining process, *notwithstanding good faith efforts on the part of both sides to such dispute,* has reached an impasse and stalemate and such dispute, if not settled, will cause or is likely to cause the interruption of an essential service, the board shall appoint a conciliator from the panel to attempt to effect the settlement of such dispute. * * *"
> (Emphasis supplied)

Obviously the phrase "notwithstanding good faith efforts" does not mean the board must find that the parties have bargained in good faith. Paraphrased, it means that if the board finds that an impasse has been reached, *even though* there have been good faith efforts, it shall appoint a conciliator.

(4) At page 19 of its brief, petitioner asserts that by virtue of Section 111.58, the state has removed from the jurisdiction of the arbitrators, those matters over which the employer and union must barg in collectively. Section 111.58 provides:

> "The arbitrator shall not make any award which would infringe upon the right of the employer to manage his business or which would interfere with the internal affairs of the union."

Petitioner has given this section a very broad and liberal interpretation. Obviously the legislature did not intend to remove from the jurisdiction of the arbitration those matters, such as wages, hours, and conditions of employment, which are universally regarded as proper subjects for collective bargaining. If such was the intention, the entire act would be meaningless. Clearly the legislature intended only to prohibit the arbitrators from passing on those subjects which are not usually regarded as proper subjects for collective bargaining.

III.

The Wisconsin Law Is Not in Violation of the Fourteenth Amendment.

(a) It is argued by petitioners at page 20 that the Wisconsin law is in violation of the Due Process Clause because it is in essence an attempt by the legislature to establish wages, hours, and working conditions of the public utility employees. Petitioner relies on *Wolff Packing Co. vs. Court of Industrial Relations*, 262 U. S. 522. The state law in question in the *Wolff* case applied broadly to a great variety of private industries. The plaintiff was a meat packing company. Because of its broad coverage the act was held invalid. However, in *Wilson vs. New*, 243 U. S. 332, it was held that such a law was proper when it applied only to a public utility.

Moreover, the philosophy of the *Wolff* case has long been rejected. *Nebbia vs. New York*, 291 U. S. 502; *West Coast Hotel Co. vs. Parrish*, 300 U. S. 379. This Court in *Lincoln Union vs. Northwest Co.*, 335 U. S. 525, said:

"That the due process clause does not ban legislative power to fix prices, wages and hours as was assumed in the *Wolff* case, was settled as to price fixing in the *Nebbia* and *Olsen* cases. That wages and hours can be fixed by law is no longer doubted since *West Coast Hotel Co. vs. Parrish,* 300 U. S. 379; *United States vs. Darby,* 312 U. S. 100, 125; *Phelps Dodge Corp. vs. Labor Board,* 313 U. S. 177, 187."

(b) The mere fact that the Wisconsin law does not include railroad employees is clearly immaterial. Obviously the legislature must have reasoned that the steam railroads in Wisconsin were already subject to adequate federal regulation.

(c) There is nothing indefinite and vague about the provisions of the Wisconsin act. Certainly any reasonable person could ascertain whether a proposed strike would cause an "interruption" of an essential service. The legislature could not have selected any clearer terminology.

IV.

The Wisconsin Law Does Not Impose Involuntary Servitude.

Petitioner's contention that the Thirteenth Amendment is violated is answered by the express provisions of the act itself. Section 111.64 of the Wisconsin Statutes expressly provides that the act does not require any individual employee to work without his consent, and that he

can quit his work at any time. In *Van Riper vs. Traffic Tel. Workers Fed. of N. J.*, 61 Atl. 2d 570 (N. J. Chancery, 1948), reversed in 61 Atl. 2d 616 (N. J. 1949) on other grounds, the court answered the challenge that the New Jersey "public utility anti-strike law" violated the Thirteenth Amendment, as follows:

> "What preserves the employee's liberty under the constitution is not collective bargaining but is the right of the individual to refuse to work for the Telephone Company. * * *"

CONCLUSION.

There are no special and important reasons for the review of this case by this Court. The action which is the subject of this petition was one to review and set aside an order of arbitrators. By operation of law this arbitration order expired in April, 1950. Petitioner is asking this Court to review a moot question.

The Wisconsin Supreme Court has not determined a novel question. The subject matter, that of alleged conflict between the state and national labor legislation, has been adjudicated by this Court time and time again. Nothing new will be gained in the way of precedent by a review of this case. The Wisconsin Court rendered its decision fully in accord with the applicable decisions of this Court.

For the foregoing reasons, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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MARTIN R. PAULSEN,
JOHN G. QUALE,
Of Counsel.

APPENDIX A.

SUPREME COURT OF THE UNITED STATES

October Term, 1950

No. 330

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, GEORGE KOECHEL and CHARLES BREHM,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, et al.,

Respondents.

STATE OF WISCONSIN)
) SS
Milwaukee County)

J. H. LUCAS, being first duly sworn on oath deposes and says: that he is the Vice-President of The Milwaukee Electric Railway & Transport Company, one of the respondents in the above entitled action; that after said action was appealed from the Circuit Court for Milwaukee

County, Wisconsin, to the Supreme Court of the State of Wisconsin, and after said cause was orally argued before said latter Court on the 3rd day of April, 1950, but before the judgment of said Court was entered on the 2nd day of May, 1950, the Petitioner herein and the Respondent, The Milwaukee Electric Railway & Transport Company, entered into a contract on the 7th day of April, 1950, effective as of the 1st day of April, 1950, in which was prescribed the wages, hours, and other conditions of employment; that said contract by its terms binds the parties thereto until the 30th day of September, 1951.

Affiant further avers that this affidavit is made for the purpose of establishing that the principal issues as stated in Petitioner's brief are now moot questions.

....(signed).....J. H. LUCAS.....

Subscribed and sworn to before me
this ....12th.... day of October, 1950.

.....Eunice M. Roberts.....
Notary Public, Milwaukee County, Wis.
My commission expires .....Dec. 20, 1953.....
(Notarial Seal)